A

TH PELITA SADONG SDN BHD & ANOR v. TR NYUTAN JAMI & ORS AND OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF CJ
SURIYADI HALIM OMAR FCJ
B ZAINUN ALI FCJ
BALIA YUSOF WAHI FCJ
JEFFREY TAN FCJ
[CIVIL APPEALS NO: 01-26-12-2014(Q), 01-27-12-2014(Q), 01-3-02-2015(Q) & 01-4-02-2015(Q)]
C 13 OCTOBER 2017

NATIVE LAW AND CUSTOM: *Land dispute – Claim of native customary rights over land – Whether statutory provisions under s. 132 of Sarawak Land Code pertaining to indefeasibility of title remain applicable – Whether indefeasibility of*
D *title prevailed over claim of native customary rights – Whether rights of leaseholders, proprietors and chargee over land could be defeated by claim of native customary rights*

LAND LAW: *Customary land – Claim of native customary rights over land – Whether statutory provisions under s. 132 of Sarawak Land Code pertaining to*
E *indefeasibility of title remain applicable – Whether indefeasibility of title over land prevailed over native customary rights – Whether rights of leaseholders, proprietors and chargee over land could be defeated by claim of native customary rights*

LAND LAW: *Customary land – Alienation – Whether alienation of lands has*
F *effect of extinguishing or infringing native customary rights – Whether payment of compensation has to be made to affected natives – Proper remedy for infringement of native customary rights – Whether award of compensation ought to be ordered in favour of claimants pursuant to ss. 15 and 197 of Sarawak Land Code*

LAND LAW: *Indefeasibility of title and interests – Land dispute – Claim of native*
G *customary rights over land – Whether statutory provisions under s. 132 of Sarawak Land Code pertaining to indefeasibility of title remain applicable – Whether indefeasibility of title prevailed over claim of native customary rights – Whether rights of leaseholders, proprietors and chargee over land could be defeated by claim of native customary rights*

H The plaintiffs, who were Iban by race, sued on behalf of themselves and 183 other residents of Kampong Lebor, claiming that prior to 1 January 1958, they and their forefathers had acquired native customary rights ('NCR') over areas of land (disputed lands) that were included in three parcels of land provisionally leased to Lembaga Pembangunan Dan Lindungan Tanah and
I Nirwana Muhibbah Sdn Bhd ('the first and second defendants') by the Superintendent of Lands and Surveys Kota Samarahan Division ('the fourth defendant'). The first and second defendants were originally the registered co-proprietors of three parcels of land, namely Lot 2, Lot 166 and Lot 7,

which were alienated to the first and second defendants by the State Government of Sarawak ('the third defendant'). The first and second defendants entered the three parcels of land and began clearing works for oil palm cultivation in early 1997. The plaintiffs claimed that the intrusion of their native customary land within the three parcels of land and the destruction of their crops were unlawful and without their consent, or without their NCR being first extinguished or without the payment of any compensation to them. Hence, they sought declarations and reliefs in the suit filed at the High Court. The trial judge, in allowing the plaintiffs' claim, held that the plaintiffs had lawfully acquired NCR, as recognised by the Sarawak Land Code (Cap 81) ('the SLC') and the other relevant legislations preceding the SLC, over the disputed lands. The trial judge also held that the issuance of the three provisional leases to the first and second defendants which covered an area that included lands over which the plaintiffs had acquired NCR violated their constitutional rights under art. 13 of the Federal Constitution. The defendants appealed to the Court of Appeal against the said decision of the trial judge. These appeals were heard together with other appeals, known as the Luking Appeals because of overlapping issues. Meanwhile, pending the decision of the High Court, TH Pelita Sadong Sdn Bhd and TH Pelita Gadong Sdn Bhd purchased the three parcels of land from the first and second defendants and thereafter became the first and second interveners respectively in the appeal before the Court of Appeal. RHB Islamic Bank Berhad ('RHB') ('the third intervener') was also granted leave to intervene in the appeals, on the basis that RHB was the registered chargee of Lot 2984, which was charged to RHB by the first and second interveners in consideration of banking facilities granted by the third intervener. The Court of Appeal, however, dismissed the defendants' and the interveners' appeals and agreed with the findings of the trial judge that there was ample evidence to come to a conclusion that the plaintiffs had proved and established their NCR over the disputed lands. Stemming from the decision of the Court of Appeal, four appeals arose. Leave to appeal was earlier granted by this court to the defendants and interveners on the following questions of law (i) in the first and second defendants' appeal, whether the statutory provisions under s. 132 of the SLC pertaining to indefeasibility of title remain applicable even if it could be shown that native customary rights had been created over land in the manner prescribed under the SLC; (ii) in the third and fourth defendants' appeal, whether the proper remedy for the loss of infringement of native customary rights as a result of the issuance of title or alienation of land where such rights subsist without extinguishment thereof, should be an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to the third parties; (iii) in the first and second interveners' appeal, what was the effect of a claim of native customary rights on the indefeasibility of title, if already asserted

A before the issuance of an issue document of title under the SLC; and (iv) in the third intervener's appeal, whether the applicant's rights as chargee could be defeated by the respondents' claim to NCR in the absence of any evidence of fraud.

B **Held (allowing defendants' and interveners' appeals)**
Per Md Raus Sharif CJ delivering the judgment of the court:

(1) The statutory provisions under s. 132 of the SLC pertaining to indefeasibility of title remain applicable even if it could be shown that NCR had been created over land in the manner prescribed under the SLC. A claim of NCR does not overrule the indefeasibility of title of land in a situation where the interest stated in the issued document of title was issued after the NCR was asserted. Based on the facts, indefeasibility of title of the land prevailed over a NCR claim. A NCR claim without title should not be put on a better footing with differential treatment. A claim for NCR and indefeasibility of title exist side by side. The disputed lands were converted to registered entities even before the plaintiffs succeeded in their NCR claim. In the absence of vitiating factors under s. 132 of the SLC, the first and second defendants' rights as leaseholders, and the first and second interveners' rights as proprietors and the third intervener's right as chargee could not be defeated by the plaintiffs' NCR. The questions of law posed in the first and second defendants' and the interveners' appeal were answered in the affirmative. (paras 39-41)

(2) If the alienation of the State land has the effect of extinguishing or infringing native rights, the Government has to, in accordance with s. 15 of the SLC, make payments of compensation to the affected natives. Customary rights may be extinguished, provided that compensation or alternative replacement land with the same rights was made available to any person whose NCR is affected by the direction of the Minister (s. 5(3) of the SLC). The extinguishment of NCR with provision for compensation was consistent with the Federal Constitution. Article 13(1) of the Federal Constitution provides that no person shall be deprived of property save in accordance with the law. By virtue of s. 5(2)(a) of the SLC, the areas claimed by the plaintiffs, which had no document of title, was State land and by reason of s. 5(2)(b) the plaintiffs were deemed to be in occupation thereof as licensees of the Government. This license may be determinable, or the rights claimed thereunder may be extinguished in accordance with the law and upon payment of compensation. The Legislature of Sarawak has prescribed a statutory remedy for any person who is deprived of any land but barred from bringing an action either against the registered proprietor on account of indefeasibility of title or against the Government for the recovery of that land, to seek compensation from

the Government, and this was envisaged under s. 197 of the SLC. Thus, the proper remedy for infringement of NCR as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment thereof, was an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties. The question of law posed in the third and fourth defendants' appeal was answered in the affirmative. (paras 43-55)

(3) An NCR claim does not overrule or prevail over the indefeasibility of title of land especially when the interest stated in the issue document of title was issued before NCR was asserted. Thus, the question of law posed in the first and second interveners' appeal was answered in the negative. As for the question of law posed in the third intervener's appeal it was answered in the negative as the third intervener's right as a chargee, could not be defeated by the plaintiff's claim to NCR in the absence of any evidence of fraud. Thus, the High Court's order for the rectification of the title register and payment of damages was set aside. By conduct of an inquiry, an award of compensation was ordered in favour of the plaintiffs pursuant to ss. 15 and 197 of the SLC to be paid by the third and fourth defendants. (para 58)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif, yang berbangsa Iban, mendakwa atas nama mereka sendiri dan bagi pihak 183 penduduk lain Kampong Lebor, bahawa sebelum 1 Januari 1958, mereka dan nenek moyang mereka telah memperoleh hak adat anak negeri ('HAAN') atas kawasan tanah ('tanah-tanah yang dipertikaikan') yang termasuk dalam tiga bidang tanah yang dipajakkan untuk sementara waktu kepada Lembaga Pembangunan Dan Lindungan Tanah dan Nirwana Muhibbah Sdn Bhd ('defendan pertama dan kedua') oleh Pengarah Tanah dan Survei Bahagian Kota Samarahan ('defendan keempat'). Defendan pertama dan kedua pada asalnya adalah pemilik berdaftar bersama tiga bidang tanah, iaitu Lot 2, Lot 166 dan Lot 7, yang diberi milikan kepada defendan pertama dan kedua oleh Kerajaan Negeri Sarawak ('defendan ketiga'). Defendan pertama dan kedua memasuki tiga bidang tanah itu dan mula menjalankan kerja-kerja pembersihan untuk penanaman kelapa sawit pada awal tahun 1997. Plaintif-plaintif mendakwa bahawa pencerobohan tanah asli mereka dalam tiga bidang tanah itu dan pemusnahan tanah mereka tidak mengikut undang-undang dan tanpa kebenaran mereka, dan tanpa penghapusan HAAN terlebih dahulu atau tanpa apa-apa bayaran pampasan kepada mereka. Dengan itu, mereka menuntut pengisytiharan dan relif-relif dalam guaman yang difailkan di Mahkamah Tinggi. Hakim bicara, dalam membenarkan tuntutan plaintif, memutuskan bahawa plaintif-plaintif telah memperoleh HAAN mengikut undang-undang, seperti yang diisytiharkan oleh Kanun Tanah Negeri Sarawak (Cap 81) ('KTS') dan peruntukan-peruntukan perundangan lain yang relevan dan mendahului KTS, atas tanah-tanah yang dipertikaikan. Hakim bicara juga memutuskan bahawa tiga

pajakan sementara pada defendan pertama dan kedua yang meliputi kawasan termasuk tanah-tanah yang plaintif-plaintif dakwa mempunyai HAN atasnya telah melanggar hak perlembagaan plaintif-plaintif bawah per. 13 Perlembagaan Persekutuan. Defendan-defendan merayu ke Mahkamah Rayuan terhadap keputusan hakim bicara tersebut. Rayuan-rayuan ini didengar bersekali dengan rayuan-rayuan lain, yang dikenali sebagai Rayuan-Rayuan Luking. Sementara menunggu keputusan Mahkamah Tinggi, TH Pelita Sadong Sdn Bhd dan TH Pelita Gadong Sdn Bhd membeli tiga bidang tanah itu daripada defendan pertama dan kedua dan seterusnya menjadi pencelah pertama dan kedua dalam rayuan di Mahkamah Rayuan. RHB Islamic Bank Berhad ('RHB') ('pencelah ketiga') juga diberi kebenaran mencelah dalam rayuan-rayuan, atas dasar RHB adalah pemegang gadaian Lot 2984, yang digadaikan kepada RHB oleh pencelah pertama dan kedua sebagai balasan kemudahan pembankan yang diberi oleh pencelah ketiga. Mahkamah Rayuan, walau bagaimanapun, menolak rayuan defendan-defendan dan pencelah-pencelah dan bersetuju dengan dapatan hakim bicara bahawa terdapat keterangan yang mencukupi untuk menyimpulkan bahawa plaintif telah membuktikan HAAN mereka terhadap tanah-tanah yang dipertikaikan. Susulan keputusan Mahkamah Rayuan, empat rayuan timbul. Kebenaran merayu diberi oleh mahkamah ini kepada defendan-defendan dan pencelah-pencelah atas soalan-soalan undang-undang berikut (i) dalam rayuan defendan pertama dan kedua, sama ada peruntukan berkanun bawah s. 132 KTS berhubung hak milik tidak boleh disangkal boleh diguna pakai walaupun HAAN telah diwujudkan atas tanah mengikut cara yang ditetapkan bawah KTS; (ii) dalam rayuan ketiga dan keempat, sama ada remedi yang sesuai untuk kehilangan pelanggaran HAAN akibat pengeluaran hak milik atau beri milik tanah iaitu hak sebegitu kekal tanpa penghapusan, patutkah award ganti rugi diberi dan bukan pengisytiharan untuk membatalkan hak milik yang dikeluarkan atau satu pembetulan hak milik tersebut yang dikeluarkan kepada pihak ketiga; (iii) dalam rayuan pencelah pertama dan kedua, apakah kesan tuntutan HAAN atas hak milik yang tidak boleh disangkal, jika sudah ditegaskan sebelum pengeluaran dokumen hak milik bawah KTS; dan (iv) dalam rayuan pencelah ketiga, sama ada hak pemohon sebagai pemegang gadaian boleh ditewaskan oleh tuntutan responden terhadap HAAN tanpa sebarang bukti penipuan.

Diputuskan (membenarkan rayuan defendan-defendan dan pencelah-pencelah)

Oleh Md Raus Sharif KHN menyampaikan penghakiman mahkamah:

(1) Peruntukan berkanun bawah s. 132 KTS berkaitan hak milik tidak boleh disangkal kekal terpakai walaupun HAAN telah diwujudkan atas tanah mengikut cara yang ditetapkan bawah KTS. Tuntutan HAAN tidak mengatasi hak milik tanah tidak boleh disangkal dalam keadaan jika kepentingan yang dinyatakan dalam dokumen hak milik telah dikeluarkan selepas HAAN ditegaskan. Berdasarkan fakta-fakta, hak milik tanah yang tidak boleh disangkal mengatasi tuntutan HAAN.

Tuntutan HAAN tanpa hak milik tidak boleh diletakkan pada kedudukan yang lebih baik dengan layanan berbeza. Tuntutan HAAN dan hak milik tidak boleh disangkal wujud sebelah-menyebelah. Berdasarkan fakta kes ini, tanah-tanah yang dipertikaikan telah ditukar pada entiti berdaftar sebelum plaintif-plaintif berjaya dalam tuntutan HAAN. Tanpa apa-apa faktor mencacatkan bawah s. 132 KTS, hak defendan pertama dan kedua sebagai pemegang pajak, dan hak pencelah pertama dan kedua sebagai pemilik dan hak pencelah ketiga sebagai pemegang gadaian tidak boleh ditewaskan oleh HAAN plaintif-plaintif. Soalan undang-undang yang diutarakan dalam rayuan defendan pertama dan kedua serta rayuan pencelah-pencelah dijawab secara afirmatif.

(2) Jika beri milik tanah negeri mempunyai kesan menghapuskan atau melanggar hak-hak anak negeri, Kerajaan perlu, menurut s. 15 KTS, membayar pampasan kepada kaum anak negeri yang terjejas. Hak-hak adat boleh dihapuskan, dengan syarat pampasan atau tanah gantian alternatif dengan hak yang sama disediakan untuk mana-mana pihak yang HAAN terjejas oleh arahan Menteri (s. 5(3) KTS). Penghapusan HAAN dengan peruntukan pampasan konsisten dengan Perlembagaan Persekutuan. Perkara 13(1) Perlembagaan Persekutuan memperuntukkan bahawa tiada siapa-siapa boleh dilucutkan harta kecuali mengikut undang-undang. Menurut s. 5(2)(a) KTS, kawasan-kawasan yang dituntut plaintif-plaintif, yang tidak mempunyai dokumen hak milik, adalah tanah negeri dan melalui alasan s. 5(2)(b), plaintif-plaintif dianggap menudukinya sebagai pemilik lesen Kerajaan. Lesen ini boleh ditentukan, atau hak-haknya yang dituntut boleh dihapuskan menurut undang-undang apabila bayaran pampasan dilunaskan. Badan Perundangan Sarawak menentukan satu remedi statutori untuk sesiapa yang dinafikan mana-mana tanah tetapi dilarang daripada membawa tindakan sama ada terhadap pemilik berdaftar disebabkan hak milik tidak boleh disangkal atau terhadap Kerajaan untuk pemulihan tanah itu, bagi menuntut pampasan daripada Kerajaan, dan ini digambarkan bawah s. 197 KTS. Oleh itu, remedi yang sesuai untuk penghapusan HAAN akibat pengeluaran atau beri milik HAAN, iaitu hak-hak sebegitu hidup tanpa penghapusan, adalah award ganti rugi dan bukan satu pengisytiharan untuk membatalkan hak milik yang dikeluarkan atau pembetulan hak milik yang dikeluarkan kepada pihak ketiga. Soalan undang-undang yang diajukan dalam rayuan defendan ketiga dan keempat dijawab secara afirmatif.

(3) Tuntutan HAAN tidak mengatasi hak milik tanah yang tidak boleh disangkal terutama sekali apabila kepentingan yang dinyatakan dalam isu dokumen hak milik dikeluarkan sebelum HAAN dihujahkan. Oleh itu, soalan undang-undang yang diutarakan dalam rayuan pencelah pertama dan kedua dijawab secara negatif. Soalan undang-undang dalam

rayuan pencelah ketiga dijawab secara negatif kerana hak pencelah ketiga sebagai pemegang gadaian, tidak boleh ditewaskan oleh tuntutan plaintif ke atas HAAN tanpa bukti penipuan. Oleh itu, perintah Mahkamah Tinggi untuk pembetulan pada pendaftaran hak milik dan bayaran pampasan diketepikan. Melalui satu inkuiri, award pampasan diperintahkan memihak pada plaintif-plaintif menurut ss. 15 dan 197 KTS untuk dibayar oleh defendan ketiga dan keempat.

Case(s) referred to:

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***

BBC Estate V Sdn Bhd & Ors v. TR Madel Anak Kandou & Ors [2008] 6 CLJ 22 CA ***(refd)***

Bisi Jinggot v. Superintendent of Lands and Surveys, Kuching Division & Ors [2013] 6 CLJ 805 FC ***(refd)***

Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***

Kebing Wan & Anor v. Lembaga Pembangunan Dan Lindungan Tanah & Ors [2012] 1 LNS 1026 HC ***(refd)***

Kho Kwang Choon v. Phuman Singh [1967] 1 LNS 68 HC ***(refd)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 1 LNS 44 SC ***(refd)***

Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***

Sapiee Gani & Ors v. Naim Cendera Sdn Bhd & Ors And Another Case [2014] 10 CLJ 642 HC ***(refd)***

Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 13(1)

Government Proceedings Act 1956, s. 29(1)(b)

Land Code (Sarawak) (Cap 81), ss. 5(2)(a), (b), (3), (4), 6(1), 15, 38, 132(1), 133, 197

National Land Code, s. 340

(Civil Appeal No: 01-26-12-2014(Q))

For the 1st & 2nd interveners - Arthur Lee Cheng Chuan & Lee Swee Huat; M/s Arthur Lee, Lin & Co Advocs

For the plaintiffs - Baru Bian, Desmond Kho, See Chee How, Jamilah Baharuddin & Jeffrey Mok; M/s Baru Bian & Co

(Civil Appeal No: 01-27-12-2014(Q))

For the 3rd intervener - Albert Tang Yew Liong; M/s Albert Tang Advocs

For the plaintiffs - Baru Bian, Desmond Kho See, Chee How, Jamilah Baharuddin & Jeffrey Mok; M/s Baru Bian & Co

(Civil Appeal No: 01-3-02-2015(Q))

For the 3rd & 4th defendants - JC Fong; State Legal Advisor, Sarawak

For the plaintiffs - Baru Bian, Desmond Kho, See Chee How, Jamilah Baharuddin & Jeffrey Mok; M/s Baru Bian & Co

(Civil Appeal No: 01-4-02-2015(Q))
For the 1st & 2nd defendants - Mohd Ivan Hussein; M/s Ivan Hussein Advocs
For the plaintiffs - Baru Bian, Desmond Kho, See Chee How, Jamilah Baharuddin & Jeffrey Mok; M/s Baru Bian & Co

[Editor's note: For the Court of Appeal judgment, please see Superintendent Of Lands And Surveys, Kota Samarahan Division & Anor v. Luking Uding & Ors; Th Pelita Sadong Sdn Bhd & Anor (Interveners) And Other Appeals [2016] 5 CLJ 378 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Md Raus Sharif CJ:

Introduction

[1] There are four appeals before us stemming from the decision of the Court of Appeal given on 27 September 2013 dismissing the appellants' appeals and affirming the decision of the High Court. The High Court had on 23 February 2012 allowed the respondents' claim in Kuching Civil Suit No. 22-249-98 III.

[2] At the High Court, TR Nyutan Ak Jami, Gangak Anak Guma and Langa Anak Kama, who are Iban by race, were the plaintiffs. They sued on behalf of themselves and 183 other residents of Kampong Lebor, Jalan Gedong, 94700 Serian Sarawak. The plaintiffs claimed that prior to 1 January 1958, they and their forefathers had acquired native customary rights (NCR) over areas of land (disputed lands) that were included in three parcels of land provisionally leased to Lembaga Pembangunan Dan Lindungan Tanah and Nirwana Muhibbah Sdn Bhd (first and second defendants) by the Superintendent of Lands and Surveys Kota Samarahan Division (fourth defendant).

[3] The first defendant is a body corporate constituted under the Land Custody and Development Authority Ordinance 1981. The second defendant is a company duly incorporated in Malaysia while the third defendant is the State Government of Sarawak. The first and second defendants were originally the registered co-proprietors of three parcels of land, namely, Lot 2 Block 6 Melikin Land District ("Lot 2"), Lot 166 Block 5 Melikin Land District ("Lot 166") and Lot 7 Block 3 Melikin Land District ("Lot 7"). These three parcels of lands were alienated to the first and second defendants by the third defendant.

[4] The first and second defendants entered the three parcels of land and began clearing works for oil palm cultivation in early 1997. The plaintiffs claimed that the intrusion of their native customary land within the three parcels of land and the destruction of their crops were unlawful and without their consent, or without their NCR being first extinguished or without the payment of any compensation to them. Hence, they sought the declarations and reliefs in the suit filed at the High Court.

[5] The first, second and third defendants denied that the plaintiffs had acquired any NCR over the areas claimed by them for the following reasons:

(i) the three parcels of land did not include any NCR land as virgin jungle existed at all material times on the three parcels of land;

(ii) the areas claimed to be farmed by the plaintiffs fell outside the boundaries of the three parcels of land;

(iii) in 1976, pursuant to s. 6(1) of the Sarawak Land Code, the Native Communal Reserve (No 4) Order 1976 was published in the *Sarawak Gazette* 51/76, whereby 121 parcels of land were declared Native Communal Reserve in the Melikin Land District. Out of these 121 parcels, 26 parcels of land were reserved for the Ibans of Kampong Lebor (ie, the plaintiffs) for kampong and agriculture purposes and as burial sites. Accordingly, the third defendant contended that the plaintiffs' rights over the land were confined to those 26 parcels of land only;

(iv) the land on both sides of the Sungei Tampoi and on the right-hand side of Jalan Gedong was virgin jungle in 1978, and the land on both sides of the river were issued with Forests Timber Licence No. T/5102 and T/5108 granted to Syarikat Eastern Sawmill Sdn Bhd and Nawi Sulaiman & Yusof Sheikh Mutu respectively. Further, under s. 38 of the Sarawak Land Code, all lands within 66 feet of the banks of all navigable rivers, streams, canals or creeks shall be reserved to the Government;

(v) the Sungei Krang land claimed by the plaintiffs was not within the area claimed by the plaintiffs as indicated in the map attached to the plaintiffs' statement of claim;

(vi) the Sungei Meringgang land was also claimed by the people of Kampong Marakai; that area was covered by virgin forests in 1978; and

(vii) the three parcels of land were alienated lawfully to the first and second defendants.

At The High Court

[6] On 23 February 2012, the trial judge allowed the plaintiffs' claim. The trial judge held that the plaintiffs had lawfully acquired NCR, as recognised by the Sarawak Land Code and the other relevant legislation preceding the Sarawak Land Code, over the disputed land. The trial judge also held that the disputed lands which the plaintiffs had lawfully acquired NCR were included in the provisional leases issued to the first and second defendants. Further, the trial judge held that the disputed lands were not included in or within the Native Communal Reserve (No 4) Order 1976 (GN Swk 51/76) published in the *Sarawak Government Gazette*, which declared and reserved, *inter alia*, the benefits of the Ibans of Kampong Lebor where the plaintiffs hail from.

[7] The trial judge further held that the issuance of the three provisional leases to the first and second defendants which covered an area that included lands over which the plaintiffs had acquired NCR violated their constitutional rights under art. 13 of the Federal Constitution.

[8] In deciding as he did, the trial judge made the following orders:

(i) a declaration that the issuance of titles to the said parcels of land comprising Lot 7, Lot 2979 and Lot 166 to the first and second defendants in so far as they impaired the plaintiffs' customary rights over the native customary land, is void;

(ii) a declaration that the act of the third defendant and the department of lands and surveys in issuing the said titles to the said parcels of land is void and/or wrongful;

(iii) the third defendant to take steps within 30 days to rectify the three provisional leases by excluding the plaintiffs' NCR land from the area covered by the provisional leases to Lot 2 Block 6, Lot 7/ Lot 2979 and Lot 166 Block 5 Melikin Land District; and

(iv) damages to the plaintiffs, occasioned by the provisional leases to be assessed by the Registrar and paid by the first and second defendants with interest at 5% per annum from date of writ to full payment.

At The Court Of Appeal

[9] The defendants appealed to the Court of Appeal against the decision of the trial judge. These appeals were heard together with other appeals, known as the Luking Appeals decided by Linton Albert J in Kuching Suit No: 22-43-2002-I, because of overlapping issues.

[10] Meantime, pending the decision of the High Court, TH Pelita Sadong Sdn Bhd and TH Pelita Gedong Sdn Bhd purchased the three parcels of land from the first and second defendants. Thereafter, Pelita Sadong Sdn Bhd and Pelita Gedong Sdn Bhd applied to intervene in the appeal before the Court of Appeal. Leave was granted and Pelita Sadong and Pelita Gedong became the first and second interveners respectively.

[11] RHB (third intervener) was also granted leave to intervene in the appeals, on the basis that RHB is the registered chargee of Lot 2984 Melikin Land District. Lot 2984 was charged to RHB by the first and second interveners in consideration of banking facilities granted by the third intervener on 30 May 2011 which are as follows:

(i) RM21 million banking facility to the first intervener; and

(ii) RM45 million banking facility to the second intervener.

A It was averred that in the absence of any caveat entered on the land, the two charges in respect of Lot 2984 were duly registered on 30 May 2011 in favour of the third intervener.

[12] The main issue before the Court of Appeal was whether the plaintiffs had succeeded in proving their NCR over the disputed lands. The Court of B Appeal was also invited to determine the issue of indefeasibility of title under s. 132 of the Sarawak Land Code, ie, whether the provisional leases issued by the third defendant gave indefeasibility of title to the holders, especially to the interveners who were *bona fide* purchasers for value of the leases from the original leaseholders. The third intervener, as registered chargee, took the C position that indefeasibility of title would apply to them as well as it had a registered interest in the disputed land.

[13] On 27 September 2013, the Court of Appeal dismissed the defendants' and the interveners' appeals. In respect of the plaintiffs' NCR claim, the Court of Appeal agreed with the findings of fact by the trial judge that there D was ample evidence to come to a conclusion that the plaintiffs had proved and established their NCR over the disputed lands. The part of land claimed by the plaintiffs which formed the river reserve was however excluded from their claimed area.

E **[14]** On the issue of indefeasibility of title, the Court of Appeal held that:

> [67] ... In our view, the issue of indefeasibility of title is dependent on the finding of fact whether the plaintiff had proved their NCR claim, which in this case the trial judge had found to be so. Therefore, in our opinion the area which the court had found to be NCR land must be excluded from the provisional leases. For that reason, the court had made the F ratification order for the state government to rectify the register so that the land that is declared to be NCR can be excluded.
>
> [68] Learned counsel for the first and second interveners - PGSB and PSSB - in Appeal No 137 submitted on the issue of evidence and proof of claim which we have already said that we would not intervene. The G other issue which they submitted is that the interveners rights to lease of state land Lot 2984 Melikin Land District is indefeasible under the Sarawak Land Code because the interveners were *bona fide* purchaser for value of the lease from the original leaseholders without notice of the NCR. We do not find any substance in this argument because it was never proven by the appellants that the NCR had been extinguished. In H our view, the purchaser of the lease took the lease together with the NCR attached to the lands.

[15] In respect of the third intervener's interest in the land, the Court of Appeal held that:

I > [69] With regard to the third intervener RHB Bank, the submission is that firstly, they had not been heard in the High Court. Secondly, their interest will be adversely affected because they have provided financing in the form of banking facilities of RM66m upon the security of Lot 2984 in the

Nyutan appeals. So, it was argued by learned counsel for the third intervener that his client is the registered chargee for the land and had acquired interest in Lot 2984. Thus, the argument as to the indefeasibility of title would apply to his client. Again, we must say that the third intervener interest in relation to the land claimed by the natives as NCR is dependent upon the trial court's finding whether the NCR claim has been proven. We have said earlier that this was so based on the finding of facts by the trial judge. In other words, what we are saying is this; the provisional lease owner had charged the land to the third intervener. Based on the size and the location and other relevant factors which the chargee must have taking into consideration, the third intervener had agreed to provide the facilities of RM66m. With the finding by the trial judge that the plaintiff had proven their NCR, and with which finding we agree, the chargor and the third intervener must now reconsider the facilities by taking into consideration the fact that the court had ordered ratification of the register. It is pertinent to note that not the entire area covered by the provisional leases was declared by the trial court as NCR land. In the circumstances, the actual land area after excluding the land which the court found to be affected by NCR, the line size that is available to the chargee as security for the financing provided is now being reduced. This, in our view is a matter that is to be negotiated between the chargee and the chargor.

At The Federal Court

[16] Stemming from the decision of the Court of Appeal, these four appeals are before us, namely:

(i) Appeal No 01-26-12-2014(Q) (first and second interveners' appeal);

(ii) Appeal No 01-27-12-2014(Q) (third intervener's appeal);

(iii) Appeal No 01-3-02-2015(Q) (third and fourth defendants' appeal); and

(iv) Appeal No 01-4-02-2015(Q) (first and second defendants' appeal)

[17] Leave to appeal was earlier granted by this court to the defendants and the interveners on the following questions of law:

1st and 2nd Defendants' Appeal

Whether the statutory provisions under s. 132 of the Land Code (Sarawak) pertaining to indefeasibility of title remain applicable even if it can be shown that native customary rights had been created over land in the manner prescribed under the same Land Code.

3rd and 4th Defendants' Appeal

Whether the proper remedy for the loss of infringement of native customary rights as a result of the issuance of title or alienation of land where such rights subsist without extinguishment thereof, should be an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties.

A 1st and 2nd Interveners' Appeal

What is the effect of a claim of Native Customary Rights (NCR) on the indefeasibility of title, if already asserted before the issuance of an issue document of title under the Sarawak Land Code [Cap 81]?

B Does it;

(a) Override the indefeasibility of title of land, the interest stand in the issued document of title that was issued after NCR was asserted and done; or does

(b) Indefeasibility of title of land prevails over such claimed NCR.

C 3rd Intervener's Appeal

Could the Applicant's rights as Chargee, be defeated by the Respondents' claim to Native Customary Rights in the absence of any evidence of fraud?

D **Submissions**

[18] Learned counsel for the first and second defendants submitted before us that:

(i) the High Court erred in allowing the plaintiffs' claim as "pre-existing" rights seemingly without giving any consideration to the assurance of
E indefeasibility of title that a registered owner of land would have under s. 132 of the Sarawak Land Code; and

(ii) as registered co-proprietors thereof, the first and second defendants were entitled to rely on s. 132 of the Sarawak Land Code which assured them certainty of their title to the land, and also vitiating circumstances of
F which their title could be challenged.

[19] Learned State Counsel made a concession at the outset that the plaintiffs had acquired NCR over the disputed lands. Notwithstanding this, however, learned State Counsel appearing for the third and fourth
G defendants' submitted that:

(i) the plaintiffs' claim for NCR within the provisional leases was based on native customs or native customary laws for which they have not been issued with any documents of title. By virtue of s. 5(2)(a) of the Sarawak Land Code, the areas claimed by the plaintiffs, which had no document
H of title, is State land. The plaintiffs are, by reason of s. 5(2)(b), deemed to be in occupation thereof as licensees of the Government. This license may be determinable or the rights claimed thereunder may be extinguished in accordance with the law and upon payment of compensation;

I (ii) State land encumbered with NCR and occupied lawfully by natives as licensees of the Government can be alienated by the Government but such alienation, will have the effect of extinguishing or infringing the native rights. In this situation, the Government will in accordance with

s. 15 of the Sarawak Land Code make payment of compensation to the affected natives. Thus, the trial judge's order for the Register of Title to be rectified after finding that the plaintiffs had acquired NCR over the disputed lands was wrong in law. The trial judge instead should have ordered the payment of compensation as provided under s. 15 of the Sarawak Land Code; and

(iii) when the plaintiffs made their claim known to the Director of Land and Surveys (who was not a party to this action) that they had NCR within the land under the provisional leases, the first and second defendants had already acquired indefeasible title over the said land under the provisional lease to which the provisions of the Sarawak Land Code relating to leases will apply. A provisional lease confers title to the land in the holder thereof. (counsel referred to *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383)

[20] Learned counsel for the first and second interveners submitted that:

(i) the right, interest and benefits of the first and second interveners in the disputed lands as purchasers for value in an arm's length transaction was indefeasible and good against the whole world pursuant to s. 132 of the Sarawak Land Code;

(ii) the only noted exception to the indefeasibility of title under the Sarawak Land Code is s. 133, on the grounds of fraud. However, fraud was never pleaded in the plaintiffs' amended statement of claim, and neither did the plaintiffs produce any evidence of fraud before the trial judge; and

(iii) any infringement, innocent or express of the plaintiffs' alleged or established NCR may give a right to the plaintiffs to seek compensation for any loss of alleged rights *in personam* but cannot override the interveners' indefeasible rights to the said lands. The trial judge ought not to have ordered the defendants to deliver possession of the said lands to the plaintiffs. (counsel referred to *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733; [2013] 3 MLJ 666).

[21] Learned counsel appearing for the third intervener, submitted as follows:

(i) the chargee as a '*bona fide* purchaser' for value was protected under the doctrine of indefeasibility of title under s. 132 of the Sarawak Land Code, save for fraud; and

(ii) the Court of Appeal erred in holding that RHB's interest in relation to the land claimed by the native as NCR was dependent upon the trial court's finding of whether the NCR claim had been proved. In the absence of actual fraud, the title of the *bona fide* purchaser for value was indefeasible. It was not dependent on whether the NCR claim could be proven or not. NCR is rights in land and all land rights are subject to the provisions of s. 132 of the Sarawak Land Code.

[22] In response, learned counsel for the plaintiffs in all the appeals submitted that:

(i) State land that is encumbered with NCR cannot be alienated by the Superintendent of Land and Surveys unless no such rights existed, or that such rights were surrendered or extinguished according to the Sarawak Land Code. The case of *BBC Estate V Sdn Bhd & Ors v. TR Madel Anak Kandou & Ors* [2008] 6 CLJ 22; [2008] 6 MLJ 285 was referred to as authority for the proposition;

(ii) indefeasibility of title cannot apply to defeat a claim for NCR unless there is clear evidence from the Superintendent of Land and Surveys that no NCR existed on the alienated land, that such rights have been surrendered or extinguished according to the provisions of the Sarawak Land Code;

(iii) indefeasibility of title applies to the Torrens system of registration for ease of conveyancing, whereas NCR existed by virtue of common law. These are two distinct rights, but in the event where those rights conflict, NCR prevailed by reason that such rights pre-existed the legislation upon which the indefeasibility of title is drawn. The case of *Kebing Wan & Anor v. Lembaga Pembangunan Dan Lindungan Tanah & Ors* [2012] 1 LNS 1026; [2012] MLJU 1284 was referred to as authority for the proposition;

(iv) registration of title by itself does not grant indefeasibility in all circumstances, as the indefeasibility conferred is deferred indefeasibility and not immediate indefeasibility. The case of *Sapiee Gani & Ors v. Naim Cendera Sdn Bhd & Ors And Another Case* [2014] 10 CLJ 642; [2011] MLJU 364 was referred to as authority for the proposition;

(v) the concepts of NCR and indefeasibility of title can exist side by side under the Sarawak Land Code. When a statute confers rights or grants protection to a particular class of persons, the court's duty is to derive a meaning that is fair or in accordance with the purpose of the particular statute. In other words, an interpretation that is fair and just should be arrived at in the protection of that particular class. NCR are not lost by colonisation and such rights do not depend on the fact of registration for its existence;

(vi) the registered proprietor takes his registered title subject to NCR wherever such rights are proved to exist. The case of *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 was referred as authority for the proposition; and

(vii) for reason of deferred indefeasibility, the plaintiffs were not barred by virtue of s. 197 of the Sarawak Land Code in bringing an action against the registered proprietor as the disputed lands were transferred to the purchasers (*TH Pelita Sadong Sdn Bhd* and *TH Pelita Gedong Sdn Bhd*) at

the time when the plaintiffs were waiting for the judgment of the High Court. The said purchasers of the disputed lands were immediate purchasers who took their title from the first and second defendants and were not subsequent purchasers.

Findings

[23] Based on the questions of law posed before this court and the submissions of the parties, we find that the issues in the first and second defendants' appeal and the interveners' appeals are intertwined, if not common. Their main gravamen was with regard to the question of indefeasibility of title. We shall address these appeals first.

First And Second Defendants' Appeals & Interveners' Appeals

[24] The issues common to all the parties in these appeals are: what is the effect of a claim of NCR on the indefeasibility of title under the Sarawak Land Code? Whether the positive finding of the existence of NCR would overrule the indefeasibility of title of land and the interest stated in the issue document of title issued after NCR was asserted, or would indefeasibility of title of the land prevail over such claim of NCR.

[25] The first and second defendants' position as registered co-proprietors thereof, was that they were entitled to rely on the provisions of the Sarawak Land Code which assured them of certainty of their title to the land, but subject to the provisions under which their title could be challenged. The first and second interveners' position was that they were purchasers for value in an arm's length transaction which acquired from the first and second defendants all the legal interest in the disputed lands. Thus, they were entitled to the protection under s. 132 of the Sarawak Land Code.

[26] The third intervener's position as the chargee bank was that the Court of Appeal erred in holding that RHB's interest in relation to the land claimed by the native as NCR was dependent upon the trial judge's finding of whether the NCR claim had been proved. The third intervener's stance was that in the absence of actual fraud, the title of the *bona fide* purchaser for value was indefeasible.

[27] The doctrine of indefeasibility of title, which is an important feature of the Torrens system, is embodied in s. 132 of the Sarawak Land Code. Section 132 provides as follows:

> 132. Indefeasibility of title.
>
> (1) Subject to this Code, the registered proprietor of any estate or interest in land to which this section applies shall, except in the case of fraud, hold such estate or interest subject to the interests noted on the Register but free from all other interest except
>
> (a) the estate or interest of a proprietor included in the Register in priority to the title under or through which the first mentioned registered proprietor claims, being an estate or interest to which this section applies;

A

(b) as regards any portion of land included in the issue document of title by virtue of a wrong description:

Provided that this exception shall not apply if the registered proprietor is a purchaser in good faith and for value of the portion of land affected, or derives title through such a

B purchaser;

(c) the implied conditions, obligations and restrictions referred to in section 32;

(d) the interest of a tenant in possession of land for a term not exceeding one year;

C

(e) any charge affecting the land under any written law; and

(f) any easement lawfully created and subsisting on the 1st day of January, 1958, or at such later date when the estate or interest affected by such easement becomes included in the Register.

D (2) This section shall apply to any estate or interest in land included in the Register, other than an estate or interest included in a previous register under the former Land Ordinance [Cap. 27 1948 Edition] and included in the Register by reason only of section 112(2) or an estate or interest acquired by a foreign person, foreign company, foreign corporation or foreign body in contravention of section 13A,

E 13B, 13C or 13E.

[28] It can be seen that although s. 132 of the Sarawak Land Code is not similarly worded as s. 340 of the National Land Code (NLC), the net legal effect of the indefeasibility accorded to s. 340 of the NLC may admit to the same construction as s. 132 of the Sarawak Land Code. In the absence of

F fraud, upon registration of a charge, the party in whose favour the registration has been effected will obtain an indefeasible title to/or interest in the land. This is a given.

[29] However, an important point to consider in this instant case is that no fraud was ever pleaded in the plaintiffs' amended statement of claim.

G Further, the plaintiffs did not produce any evidence in the High Court to prove the existence of fraud. The question now is whether the title of the first, second defendants and the interveners were indefeasible.

[30] In this case, it is an undisputed fact that the provisional leases were

H issued in 1996. On record, the plaintiffs, through their solicitors by a letter dated February 2002 notified the State Government and the first and the second defendants when the action was filed in November 1998 that they had NCR to a part of the land covered under the provisional leases and wanted their NCR excluded from the provisional leases. It is also undisputed that the titles were issued without the NCR being first extinguished. There was also

I no compensation paid in this case.

[31] Section 5(2)(a) and (b) of the Sarawak Land Code provides, *inter alia*, that until a document of title is issued over land which NCR had been acquired by a native, it shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold it by license from the Government. However, in a situation where the State land is encumbered by NCR, no alienation thereof shall take place, until all NCR have been surrendered or terminated or provisions for compensating the persons entitled thereto in accordance with the Sarawak Land Code is complied with. (*Bisi Jinggot v. Superintendent of Lands and Surveys, Kuching Division & Ors* [2013] 6 CLJ 805).

[32] We agree that titles should not be issued over land encumbered with NCR unless they have been extinguished; but with respect, we hold the view that, once the titles are issued, indefeasibility of title sets in. (*Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383). In the present case, it is an undisputed fact that the provisional leases were issued in 1996. By the time this action was commenced in November 1998, the first and second defendants had already entered the land (1997) and cleared it for cultivation.

[33] The disputed lands being registered entities accorded protection to the interested parties under the aegis of indefeasibility. The orders made by the trial judge to nullify the provisional leases or to exclude areas claimed by the plaintiff as their NCR, where no fraud had been alleged against the registered owners of the land under the provisional leases or the registered charge thereof, thus, would be contrary to the doctrine of indefeasibility of title embodied under s. 132(1) of the Sarawak Land Code. As correctly pointed out by the High Court in *Nikodemus Singai*, once the title is issued, the doctrine of "indefeasibility of title" sets in unless the registered interest in the land had been procured by fraud.

[34] The doctrine of indefeasibility here does not defeat the *in personam* claim that the plaintiffs mounted before the court. It does not abrogate the principles of equity but alters the application of particular rules of equity in so far as it is necessary to achieve its special objects. The then Supreme Court in *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449 stated that:

> The Torrens system as codified by the National Land Code 1965 deals with registration of land and provides simplicity and certitude in transfers of land. It is a system of conveyancing and provides indefeasibility of title to a registered owner of land against any rival claimants except in the case of fraud or similar misconduct as provided under section 340(2) of the Code. It does not prevent or restrict the creation of beneficial interests in land by way of express, implied or resulting trust arising by operation of law in Malaysia by virtue of section 3 of the Civil Law Act 1956. *It does not abrogate the principles of equity but alters the application of particular rules of equity in so far as is necessary to achieve its special objects. In this way, the court*

A *is entitled to exercise jurisdiction in personam to insist upon proper conduct in accordance with equitable principles and norms (see Wilkins & Ors v. Kannammal [1951] MLJ 99 100; Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 45; and Oh Hiam & Ors v. Tham Kong [1980] 2 MLJ 159 164-165*).

(emphasis added)

B **[35]** The net effect of the protection of indefeasibility accorded to the first and second interveners would mean that any infringement, innocent or express which the plaintiffs seek compensation, cannot override the interveners' registered interest which is indefeasible. We, with respect find that the High Court ought to have ordered compensation *in lieu* of the C declaratory orders pleaded for and ought not to have ordered the defendants to deliver possession of the said lands. Once an interest is registered, the court has no power in the absence of fraud to remove or even order the removal of the name of the proprietor by way of rectification. (*Kho Kwang Choon v. Phuman Singh* [1967] 1 LNS 68; [1968] 1 MLJ 183).

D **[36]** Legally, the third intervener's position was no different from that of the first and second defendants. Decided cases favour the third intervener's stance. In the case of *Kho Kwang Choon v. Phuman Singh (supra)*, the High Court held that once the interest is registered, the court has no power, in the absence of fraud, to remove or even order the removal of the name of the E proprietor of the interest.

[37] Further thereto, the third intervener took umbrage with the suggestion made by the Court of Appeal which said:

[69] With regard to the third intervener, RHB Bank, the submission is F that firstly, they had not been heard in the High Court. Secondly, their interest will be adversely affected because they have provided financing in the form of banking facilities of RM66 million upon the security of Lot 2984 in the Nyutan appeals. So, it was argued by the learned counsel for the third intervener that his client is the registered chargee for the land and had acquired interest in Lot G 2984. Thus, the argument as to the indefeasibility of title would apply to his client. Again, we must say that the third intervener's interest in relation to the land claimed by the natives as NCR is dependent upon the trial court's finding of whether the NCR claim has been proven. We have said earlier that this was so based on the finding of facts by the trial judge. In other words, what we are H saying is this; the provisional lease owner had charged the land to the third intervener. Based on the size and the location and other relevant factors which the chargee must have taken into consideration, the third intervener had agreed to provide the facilities of RM66 million. With the finding by the trial judge that the plaintiff had proven their NCR, and with which finding we I agree, the chargor and the third intervener must now reconsider the facilities by taking into consideration the fact that the court had ordered ratification of the register. It is pertinent to note that not the entire area covered by the provisional leases was declared by the

> trial court as NCR land. In the circumstances, the actual land area after excluding the land which the court found to be affected by NCR, the line size that is available to the chargee as security for the financing provided is now being reduced. This, in our view, is a matter that is to be negotiated between the chargee and the chargor.

[38] According to learned counsel, to allow such a suggestion to stand would amount to rewriting the land law, and more seriously, creating uncertainty to the securitisation of banking facilities when landed properties are charged. We have no reason to disagree with the third intervener on this issue. We agree with the submission of learned counsel for the third intervener that such a suggestion is not backed by any statutory provision or case law. To allow such a suggestion to stand would create uncertainty to the securitisation of banking facilities when landed properties are charged.

[39] For the reasons adumbrated above, we propose to answer the questions of law posed in the first and second defendants' and in the interveners' appeals in the following manner: The statutory provisions under s. 132 of the Sarawak Land Code pertaining to indefeasibility of title remain applicable even if it can be shown that NCR had been created over land in the manner prescribed under the Sarawak Land Code. A claim of NCR does not overrule the indefeasibility of title of land in a situation where the interest stated in the issued document of title was issued after NCR was asserted. Based on the facts, indefeasibility of title of the land prevails over a NCR claim. It is not a question of whether a claim for NCR overrides indefeasibility of title. Both these legal concepts exist side by side.

[40] It is our judgment that an NCR claim without title should not be put on a better footing with differential treatment. (*Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766). A claim for NCR and indefeasibility of title exist side by side. Based on the facts of this case, the disputed lands were converted to registered entities even before the plaintiffs succeeded in their NCR claim.

[41] In the absence of the vitiating factors under s. 132 of the Sarawak Land Code, the first and second defendants' rights as leaseholders, and the first and second interveners as proprietors and the third intervener as chargee cannot be defeated by the plaintiffs' NCR.

Third and Fourth Defendants' Appeal

[42] We now address the third and fourth defendants' appeal. Since it was our earlier finding (in the first and second defendants' and the interveners' appeals) that indefeasibility of title and a claim for NCR exist side by side, we must now consider the appropriate remedy for the plaintiffs in the instant case. Given that the issue of proof of the plaintiffs' NCR is not an issue, we propose to only deal with the appropriate remedy for the infringement of the plaintiffs' rights.

[43] As stated earlier, learned State Counsel appearing for the third and fourth defendants highlighted to us that in a situation where the State land is encumbered by NCR, no alienation thereof shall take place, until all NCR have been surrendered or terminated or provision for compensating the persons entitled thereto in accordance with the Sarawak Land Code is complied with. (*Bisi Jinggot v. Superintendent of Lands and Surveys, Kuching Division & Ors (supra)*). However, if the alienation of the State land has the effect of extinguishing or infringing native rights, the Government has to, in accordance with s. 15 of the Sarawak Land Code, make payments of compensation to the affected natives. Section 15 of the Sarawak Land Code provides as follows:

> 15. Protection of native customary rights.
>
> (1) Without prejudice to section 18 and 18A, where native customary rights have been lawfully created over State land, such land shall not be alienated or be used for a public purpose until all native customary rights have been surrendered or terminated or provisions for compensating the persons entitled thereto have been made.
>
> [Subs. by A95]
>
> (2) (a) The surrender of native customary rights under subsection (1) shall be effected by way of a deed of surrender, in such form as may be approved by the Director, and shall be signed by the Superintendent and the persons whose rights are to be surrendered to the Government for the purposes of subsection (1).
>
> (b) Prior to the signing of the deed referred to in paragraph (a), the Superintendent shall cause a notice to be posted at the District Office and at any other convenient places in the neighbourhood where the land is situated and a copy thereof served on the Headman of the area where the land is located, stating that any person who has any objection to the intended surrender of the native customary rights over the land described in the notice by reason that he had also lawfully created such rights over the said land and ought to be compensated, shall within 21 days from the date of posting of the notice in the *Gazette*, submit his objection in writing to the Superintendent.
>
> (c) Where the Superintendent receives any objection filed pursuant to paragraph (b), he shall determine the validity or otherwise of such objection, and if he overrules the same, he shall notify the objector in writing.
>
> (d) The deed of surrender shall not be signed by the parties referred to in paragraph (a), until a lapse of seven days after the Superintendent has notified the objector of his decision under paragraph (c).
>
> (e) Where the Superintendent upholds the objections and the objector agrees to the surrender of his rights and compensation to be paid to him, the Superintendent shall include the name of the objector as a party to the deed of surrender.

(f) Where the objector whose claim is upheld refuses to surrender his native customary rights, the matter shall be referred to the Minister who may direct that his rights be terminated in accordance with the provisions of this Code and compensation to be paid to him, or that the land over which he had lawfully created native customary rights, be excluded from the process of alienation.

(3) Where the provisions of this section have been complied with in the surrender of native customary rights, the Government shall not be liable

(a) for any amount of compensation other than that stipulated in the deed of surrender; or

(b) to pay any compensation to any person who fails to raise any objections against the surrender in accordance with the provisions of the section; or

(c) to any person who, subsequent to the execution of the deed of surrender, claims to have rights over the area referred to in the deed of surrender or to any heirs, beneficiaries or successors in title or estate of the persons who are parties to the said deed.

(4) The granting of permits to occupy Native Customary Land under rules made under section 213 shall not be deemed to be inconsistent with subsection (1).

[44] The above section is further strengthened by s. 5(3) and (4) of the Sarawak Land Code which provides:

5. Native customary rights

(1)

(2)

(3) (a) Any native customary rights may be extinguished by direction issued by the Minister which shall be:

(i) published in the *Gazette* and one newspaper circulating in Sarawak; and

(ii) exhibited at the notice board of the District Office for the area where land, over which such rights are to be extinguished is situated,

and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:

Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, otherwise.

A (b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date publication or exhibition B thereof.

(c) No claim for compensation for extinguishment of native customary rights shall be entertained by the Superintendent unless such claim is submitted within the period stipulated in paragraph (b).

C (4) (a) Any person who is dissatisfied with any decision made by the Superintendent under subsection (3) on the ground that:

(i) his claim to native customary rights has been rejected or not recognised by the Superintendent;

(ii) the allocation of land over which such rights are to be D exercised, in inadequate or inequitable; or

(iii) the amount or apportionment of compensation is inadequate, unfair or unreasonable,

may within twenty-one days from the date of receipt of the decision of the Superintendent, by notice in writing addressed to the E Superintendent, require the matter to be referred to arbitration in accordance with section 212.

(b) Upon receipt of the notice of arbitration, the Superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be F deposited in the High Court, pending the outcome of such arbitration proceedings.

[45] Based on the foregoing, and looking at the scheme of the provisions of the Sarawak Land Code, the Code does provide statutory safeguards with regard to the extinguishment of native customary rights. It is crystal clear, G from a reading of s. 5(3) of the Sarawak Land Code, that the customary rights may be extinguished, provided that compensation or alternative replacement land with the same rights is made available to any person whose NCR are affected by the direction of the Minister.

[46] It is a well-established principle that a court does not make an order H in futility. Rectification of title is going to be a futile exercise. The disputed lands are now a registered entity. Thus, the only alternative remedy available to the plaintiffs is for them to be paid adequate compensation. The principle of compensation for loss of livelihood is now well-established. The law, in this case, allows for the extinguishment of NCR where clear words are used I in the statute that payment of compensation is provided for. (*Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal (supra)*).

[47] The extinguishment of NCR with provision for compensation is consistent with the Federal Constitution. Article 13(1) of the Federal Constitution provides that no person shall be deprived of property save in accordance with the law. The law that would apply in this case would be the Sarawak Land Code in particular s. 5(3) and (4) of the said Code.

[48] To conclude, by virtue of s. 5(2)(a) of the Sarawak Land Code, the areas claimed by the plaintiffs, which have no document of title, is State land and by reason of s. 5(2)(b) the plaintiffs are deemed to be in occupation thereof as licensees of the Government. This license may be determinable, or the rights claimed thereunder may be extinguished in accordance with the law and upon payment of compensation.

[49] Another important point worth noting is that the declaratory orders of the High Court that the provisional leases are void and that the Register be rectified to exclude the plaintiffs' NCR lands from the land alienated *vide* provisional lease to the first and second defendants, would amount to an order for recovery of land against the Government of the NCR areas (which would be State land) in favour of the plaintiffs. Such an order would be contrary to s. 29(1)(b) of the Government Proceedings Act 1956 which provides as follows:

> 29. Nature of relief.
>
> (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may *in lieu* thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

[50] The Legislature of Sarawak likewise has prescribed a statutory remedy for any person who is deprived of any land but barred from bringing an action either against the registered proprietor on account of indefeasibility of title or against the Government for the recovery of that land, to seek compensation from the Government. This is envisaged under s. 197 of the Sarawak Land Code which provides as follows:

> 197. Compensation for loss.
>
> Any person who is deprived of any land, or of any estate or interest therein, by reason of any of the provisions relating to indefeasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.

[51] The above statutory protection was discussed at length in the case of *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733 . This court in *Husli bin Mok* held that s. 197 applies where a native is deprived of his NCR land by reason of the alienation of the land without extinguishment of his native rights and payment of compensation. This court held that:

> [24] We are of the view when the Legislature uses the words "any land" in s. 197 of the Land Code, it must have intended to refer to all or any of the category of land stated above. For the words "any person" in s 197 of the Land Code it must be interpreted it does not intend to restrict the application of that section only to those persons whose interests are registered in the Land Registers or "registered proprietors" as provided in s 113 of the Land Code. The words "any person" must also apply to any native such as the plaintiff who has native customary rights and deemed to hold the land which is State land as licensee from the Government.
>
> [25] We are also of the view to restrict the application of s. 197 of the Land Code to only "registered land or registered interest in land" could result in an absurdity. It would then appear that NCR land owners without titles to their land cannot institute an action for recovery of compensation against the government if they were deprived of their NCR land. With respect that could not have been the intention of the Legislature.

[52] Since the Legislature has provided a specific remedy for any person who is deprived of any land (including native customary land without document of title), s. 197 of the Sarawak Land Code therefore applies.

[53] We also agree with the submission of learned State Counsel that no special circumstances have been shown by the plaintiffs for the High Court to grant the declaratory reliefs sought, notwithstanding the specific remedy provided for under s. 197 of the Sarawak Land Code.

[54] The trial judge's decision, which was affirmed by the Court of Appeal, to disregard the salient provisions of ss. 15 and 197 of the Sarawak Land Code and the decision of this court in *Husli Mok v. Superintendent Of Lands & Surveys & Anor (supra)*, warrants appellate intervention. Clearly, the trial judge after making a positive finding that the plaintiffs' had proved their NCR against the defendants, ought to have ordered for the payment of compensation from the Government as prescribed for under the law.

Conclusion

[55] In the final analysis, we find that the trial judge and the judges of the Court of Appeal had failed to appreciate the fact that the disputed lands, namely provisional leases of Lot 2, Block 6 Melikin Land District, Lot 166 Block 5 Melikin Land District and Lot 7 Block 3 Melikin Land District were later converted to Lease of State Land Lot No 2984 Melikin Land District. The effect of this conversion is that the disputed lands are no longer provisional Leases but a Lease proper and are entitled to the protection of s. 132 of the Sarawak Land Code, which title stands good against the whole world.

[56] It is our judgment that s. 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it could be shown that NCR had been created over land in the manner prescribed under the same Code. A claim for NCR does not defeat the indefeasibility of title of land, even though the interest stated in the issue document of title was issued after NCR was asserted. The first and second defendants' rights as leaseholders, and the first and second interveners as proprietors and the third intervener as chargee are not defeated by the plaintiffs' claim to NCR.

[57] The statutory basis for compensation and damages for infringement/ and or extinguishment of NCR rights is provided for under the Sarawak Land Code, which should have been ordered in this case by the trial judge.

[58] For the reasons adumbrated above, we answer the questions of law posed in these appeals in the following manner:

(i) first and second defendants' appeal

We answer the question of law posed in the first and second defendants' appeal in the affirmative. We find that s. 132 of the Sarawak Land Code pertaining to indefeasibility of title remains applicable even if it can be shown that NCR had been created over land in the manner prescribed under the Sarawak Land Code.

(ii) third and fourth defendants' appeal

We answer the question of law posed in the third and fourth defendants' appeal in the affirmative. We find that the proper remedy for the infringement of NCR as a result of the issuance of title or alienation of

A NCR, where such rights subsist without extinguishment thereof, is an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties.

(iii) first and second interveners' appeal

B We answer the question of law posed in the first and second interveners' appeal in the negative. We find that an NCR claim does not overrule or prevail over the indefeasibility of title of land especially when the interest stated in the issue document of title was issued before NCR was asserted.

C (iv) third intervener's appeal

We answer the question of law posed in the third intervener's appeal in the negative. We find that the third intervener's right as chargee, could not be defeated by the plaintiffs' claim to NCR in the absence of any evidence of fraud.

D

[59] For the reasons aforesaid, the defendants' and the interveners' appeals are hereby allowed. The High Court order for the rectification of the title register and payment of damages is hereby set aside. By conduct of an inquiry, we order that the award of compensation in favour of the plaintiffs pursuant to ss. 15 and 197 of the Sarawak Land Code, be paid by the third and fourth defendants. Each party is to bear its own costs.

E

F

G

H

I